IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-701

JOHN J. BRENNAN,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES M. RUSS
I. PAUL MANDELKERN

Law Offices of James M. Russ
441 First Federal Building
109 East Church Street
Orlando, Florida 32801
Telephone: (305) 849-6050

Attorneys for Petitioner

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Petitioner, JOHN J. BRENNAN, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on October 20, 1976, denying a petition for rehearing directed to that Court's written opinion dated September 13, 1976. The initial Fifth Circuit opinion affirmed a judgment entered by the United States District Court for the Middle District of Florida in a criminal prosecution brought by the United States against the petitioner.

The opinion of the United States Court of Appeals for the Fifth Circuit upheld the District Court's denial of a motion to suppress tangible evidence seized by federal agents conducting a warrantless search of petitioner's hangar and aircraft. A timely petition for rehearing was denied by the Court of Appeals and judgment was entered. (App. 14a, 15a). The petitioner now prays that this Court review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The September 13, 1976, opinion of the United States Court of Appeals for the Fifth Circuit is reported at 538 F.2d 711. The corrected slip sheet opinion is set out in the Appendix to this petition.

The order of the United States Court of Appeals for the Fifth Circuit denying rehearing is not presently reported. This order is also set out in the Appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on September 13, 1976, affirming the trial court's judgments of conviction. The Court of Appeals denied a timely petition for rehearing on October 20, 1976. This petition for certiorari is filed within thirty (30) days of the order denying rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an unreliable informant's tip that meets neither of the tests articulated by this Court in *Spinelli*

v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L.Ed. 2d 637 (1969), and *Aguilar v. Texas,* 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed. 2d 723 (1964), can supply probable cause for a search when innocuous information contained in the tip is corroborated by the on-the-scene observations of the searching agents.

2. Whether a search warrant is required before federal agents may lawfully search inside a locked hangar in which an immobile aircraft is parked and the only suspect is outside in their custody.

CONSTITUTIONAL PROVISIONS INVOLVED

The provision of the Fourth Amendment to the United States Constitution applicable here provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable search and seizures shall not be violated * * *.

STATEMENT OF THE CASE

Petitioner was the defendant in a criminal prosecution instituted in the United States District Court for the Middle District of Florida. On September 26, 1975, petitioner was found guilty by a jury of importation into the United States of marijuana in violation of 21 U.S.C. §§ 952 and 960, and of possession of marijuana in violation of 21 U.S.C. § 844(a). Judgments of conviction were entered by the District Court and sentences were imposed.

Prior to trial, a timely motion seeking the suppression of this contraband and other tangible evidence seized from

petitioner's hangar and aircraft was filed by the petitioner. Evidentiary hearings on this motion were held on July 31, August 21, and September 22, 1975.

Testimony at these evidentiary hearings revealed that this warrantless search was initiated by a telephone call to a Drug Enforcement Administration (DEA) agent by a previously unknown and unreliable informer. This informer told the agent that he had information leading him to suspect that petitioner "was going to engage in some smuggling activities into the Melbourne [Florida] Regional Airport." Several days later the agent met with the informer. At this meeting, the informer told the agent that it was his conclusion that the petitioner owned an aircraft described as a 1969 Beagle, blue and gold in color, with tail number N569MA. This informer also told the agent that he felt that petitioner would utilize this Beagle aircraft to fly to Colombia, South America, and bring back a considerable amount of marijuana. The informer's testimony at the suppression hearing shows that this information was not based upon his direct knowledge, but it was merely his *conclusion* and *feeling* based upon second-hand information and innocuous remarks made by petitioner. There was no suggestion that anyone other than petitioner was involved in this alleged smuggling venture.

On April 28, 1975, the informer called the agent and reported that he had recently talked tc petitioner by phone and inferred from the conversation that the petitioner's smuggling trip would take place "sometime in the next two to three weeks * * *." Based upon his own general knowledge, he told the agent that a round-trip flight from Melbourne to Colombia, South America, would take an estimated 16-17 hours.

The DEA agent claimed that on May 17, 1975, nineteen days after the vague tip, at approximately 11:00 a.m., he received hearsay information that aircraft N569MA had taken off from the Melbourne airport in a southwesterly direction (towards the interior of the State of Florida). This alleged radar contact with the plane was lost as it approached Miami. There was no direct evidence that aircraft N569MA left this country and was actually in flight that day or that petitioner was the pilot.

Fourteen hours later, at 1:30 a.m. on the morning of May 17, United States Customs Agents sighted a Beagle aircraft on the ground, moving along a taxiway at the Melbourne airport and identified it as N569MA. One agent testified that N569MA did not have its exterior navigational lights on.

As aircraft N569MA taxied along the taxiway, the Customs agents drove their van toward the hangar located at the foot of the taxiway. During this time, the aircraft entered the hangar and was parked inside with its engines off. The petitioner exited the hangar and locked its doors. As he was walking away from the hangar toward a nearby automobile, he was placed in custody by federal agents standing twenty to twenty-five feet from the locked doors. These agents seized the keys to the hangar, aircraft, and the automobile from petitioner. There was no one else in the vicinity except petitioner and the seven armed law enforcement officers.

While petitioner was held in custody, a Customs agent, without a search warrant, entered his hangar and discovered the contraband and other tangible evidence inside the aircraft. Following this discovery, petitioner was arrested.

After these evidentiary hearings, the District Court denied the motion to suppress, ruling that this warrantless search was within the "border search" exception to the warrant requirement of the Fourth Amendment.

In affirming the petitioner's convictions, the United States Court of Appeals for the Fifth Circuit first held that this search was not at the functional equivalent of the border and was therefore not a "border search." 538 F.2d at 716. (Slip sheet opinion 5586, App. 6a). However, the Fifth Circuit went on to make the factual determination that probable cause for this search existed through a combination of hearsay information from the informer's tip and the searching agents' on-the-scene corroboration. 538 F.2d at 719-20. (Slip sheet opinion 5590, App. 10a).

The Fifth Circuit said, in connection with the informer's tip:

> Neither [the informer] nor his tip met the *Aguilar* standards for informant credibility or informational reliability, even if the modified standards for first-time informants are employed.
>
> * * * *
>
> Similarly, the advance investigation conducted by DEA officials failed to corroborate enough of the significant details of [the informer's] story to comply with the *Spinelli* formula for curing deficient tips. 538 F.2d at 720. (Slip sheet opinion 5591, App. 11a).

However, the Fifth Circuit went on to say:

> * * * At the point at which the law enforcement officials detected the Beagle aircraft proceeding

> down the taxiway in the dark with its lights off, at a time almost exactly that predicted by [the informer] in his estimate for the time required for a smuggling flight, the quantum-of-knowledge ring closed around Brennan in the manner approved by the Supreme Court in *Draper v. United States*, * * *. Through self-corroboration, equivocal information ripened into probable cause on the scene. 538 F.2d at 721. (Slip sheet opinion at 5592, App. 12a) (citation omitted).

The Fifth Circuit also held that the failure of the searching officers to obtain a search warrant was excused because of "exigent circumstances." The Court reasoned that since "exigent circumstances" existed at the time that "probable cause" was generated, *i.e.*, when the aircraft was identified on the taxiway, these circumstances also existed at the time of the search when the airplane was parked inside its hangar with its engines off. 538 F.2d at 721 (Slip sheet opinion 5592, App. 12a). In effect, the Fifth Circuit applied the so-called *Carroll* doctrine to this case and relied on the holdings of this Court in *Chambers v. Maroney*, 399 U.S. 42, 90 S. Ct. 1975, 26 L.Ed. 2d 419 (1970), and *Texas v. White*, 423 U.S. 67, 96 S. Ct. 304, 46 L.Ed. 2d 209 (1975).

REASONS FOR GRANTING THE WRIT

I. AN UNRELIABLE INFORMANT'S TIP THAT MEETS NEITHER OF THE TESTS ARTICULATED BY THIS COURT IN *SPINELLI V. UNITED STATES*, 393 U.S. 410, 89 S. Ct. 584, 21 L.Ed. 2d 637 (1969), AND *AGUILAR V. TEXAS*, 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed. 2d 723 (1964), CANNOT SUPPLY PROBABLE CAUSE FOR A SEARCH WHEN INNOCUOUS INFORMATION CONTAINED IN THE TIP IS CORROBORATED BY THE ON-THE-SCENE OBSERVATIONS OF THE SEARCHING AGENTS.

This Court, in *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S. Ct. 1509, 12 L.Ed. 2d 723 (1964), devised a two-prong test for assessing whether an informant's tip has the probative value necessary to establish probable cause. First, there must be some indication of the underlying circumstances from which the informant concluded that the facts are as he says they are, and second, there must be some statement of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable.

The *Aguilar* test was modified in *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L.Ed. 2d 637 (1969), where this Court held that the first prong of the test can be satisfied if the tip describes the accused's criminal activity in sufficient detail that a neutral magistrate may know that the informer is relying on something more substantial than a casual rumor or the individual's general reputation or if independent observations by the law enforcement officers corroborate the allegation that the accused has committed the alleged criminal conduct or is in the process of committing a crime. 393 U.S. at 416-418. *Spinelli* also teaches that otherwise innocent conduct is

not imbued with an aura of suspicion by virtue of an unreliable informer's tip, and the corroborating evidence must be of criminal conduct. 393 U.S. at 418.

As an example, the *Spinelli* Court alluded to the prior opinion in *Draper v. United States*, 358 U.S. 307, 79 S. Ct. 329, 3 L.Ed. 2d 327 (1959). In that case, the informer was a "special employee" of the Bureau of Narcotics and had given accurate and reliable information to federal agents for a period of six months. He reported that Draper had gone to Chicago the day before by train and that he would return to Denver by train with three ounces of heroin on one of two specified mornings. Moreover, he went on to describe with minute particularity the clothes that Draper would be wearing on his arrival at the Denver station; and he gave a physical description of the suspect. The *Spinelli* Court concluded that such a wealth of detail created a reasonable inference that the informant had gained his information in a reliable way. 393 U.S. at 417. Furthermore, independent police work in *Draper* corroborated much more than small detail that had been provided by the informant. The federal agent, upon meeting the inbound Denver train on one of the specified mornings, saw a man whose dress and physical appearance corresponded precisely to the informant's detailed description. "It was then apparent that the informant had not been fabricating his report out of the whole cloth * * *." 393 U.S. at 417.

The petitioner submits that the opinion of the United States Court of Appeals for the Fifth Circuit misconceives and misapprehends the holdings of this Court in *Aguilar*, *Spinelli*, and *Draper*. The information that was known to the searching officers in this case falls far short of the standards established by this Court. The informer's tip simply

did not provide the wealth of detail supplied by the informant in *Draper*. Furthermore, all of the allegations contained in the tip were based upon guesswork, conclusions, and inferences. Of paramount importance, the surveillance of aircraft N569MA on the night of May 17-18, 1975, by the searching officers contained no reasonable suggestion of criminal conduct when the officers' observations are taken apart from the tip and judged by an objective standard. There is absolutely no evidence in the record of this case to support the objective conclusion that there is anything incriminating about taxiing an aircraft along a taxiway during normal airport hours with exterior navigational lights off. Thus, nothing which the agents observed was inconsistent with completely innocent behavior.

The on-the-scene observations could not corroborate the essence of the tip that Beagle aircraft N569MA was engaged in smuggling contraband on the night of May 17-18, 1975. The corroborating observations by the searching agents do not provide the necessary guarantees of the informant's reliability and the dependability of his information. The Fifth Circuit's holding cannot be squared with this Court's *Aguilar-Spinelli* test because it cannot be said that "* * * the tip [as corroborated] * * * is as trustworthy as a tip which would pass [both] tests without independent corroboration." 393 U.S. at 415.

The federal courts have held that a vague, unreliable informer's tip can only give rise to probable cause where the on-the-scene observations, viewed apart from the tip, verify that the suspect is involved in not just suspicious behavior but criminal activity. *See, e.g., United States v. Jackson,* 533 F.2d 314 (6 Cir. 1976); *United States v. Jordon,* 530 F.2d 722 (6 Cir. 1976); *United States v. Larkin,* 510 F. 2d 13 (9 Cir. 1974). At most, the on-the-scene observa-

tions in this case verified that the informer knew the type and identification number of the aircraft that petitioner owned, which, at some point in time during a two-to-three week period, would taxi along a taxiway at the Melbourne Regional Airport.

This situation closely parallels the situation confronted by this Court in *Whiteley v. Warden*, 401 U.S. 560, 91 S. Ct. 1031, 28 L.Ed. 2d 306 (1971). In that case, Mr. Justice Harlan, speaking for this Court, summarized the proper role of corroborative observations in curing deficiencies in an informant's tip:

> This Court has held that where the initial impetus for an arrest is an informer's tip, information gathered by the arresting officers can be used to sustain a finding of probable cause for an arrest that could not adequately be supported by the tip alone. * * * *But the additional information acquired by the arresting officers must in some sense be corroborative of the informer's tip that the arrestees committed the felony or as in Draper itself, were in the process of committing the felony.* * * * In the present case, the very most the additional information tended to establish is that either Sheriff Ogburn, or his informant, or both of them, knew Daley and Whiteley and the kind of car they drove; the record is devoid of any information at any stage of the proceeding from the time of the burglary to the event of the arrest and search that would support either the reliability of the informant or the informant's conclusion that these men were connected with the crime. 401 U.S. at 567 (emphasis added and citations omitted).

The Fifth Circuit's opinion is contradictory to the above federal court decisions, including the decisions of this Court, and has the effect of watering down the *Aguilar-Spinelli* test, making it a nullity.

Consequently, this Court should grant certiorari in order to announce that probable cause for a warrantless search is not established when the searching officers corroborate a vague and unreliable tip merely by the suspect's fortuitous arrival on the scene.

II. A SEARCH WARRANT IS REQUIRED BEFORE FEDERAL AGENTS MAY LAWFULLY SEARCH INSIDE A LOCKED HANGAR IN WHICH AN IMMOBILE AIRCRAFT IS PARKED AND THE ONLY SUSPECT IS OUTSIDE IN THEIR CUSTODY.

The Fifth Circuit opinion holds that it was impracticable to obtain a search warrant for the petitioner's hangar and aircraft because of "exigent circumstances." Applying the so-called *Carroll* doctrine to an airplane and relying on this Court's decisions in *Chambers v. Maroney*, 399 U.S. 42, 90 S. Ct. 1975, 26 L.Ed. 2d 419 (1970), and *Texas v. White*, 423 U.S. 67, 96 S. Ct. 304, 46 L.Ed. 2d 209 (1975), the Fifth Circuit held that because of aircraft N569MA's mobility, "* * * the plane could have been stopped and searched any time after probable cause was generated, *i.e.*, as soon as it was identified on the taxiway." 538 F.2d at 721. (Slip sheet opinion 5592, App. 12a). The Court then reasoned that this exigency did not dissipate once N569MA was parked inside its hangar and petitioner was taken into custody outside. However, this holding ignores the parameters of the *Carroll* doctrine and the "automobile" exception to the warrant requirement of the Fourth Amendment as established by this Court.

In *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L.Ed. 543 (1925), this Court upheld the warrantless search of an automobile "* * * where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." 267 U.S. at 153. In *Chambers v. Maroney, supra,* and *Texas v. White, supra,* a divided Court upheld the warrantless search of an automobile that was seized while moving on the highway even though the search was conducted sometime later after the automobile was impounded.

The seemingly broad doctrine of *Chambers* was considerably narrowed by a plurality of this Court in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L.Ed. 2d 564 (1971). Coolidge was arrested inside his house while his car was parked outside in the driveway. "There was no way in which he could conceivably have gained access to the automobile after the police arrived on his property." 403 U.S. at 460. Since their search warrant was invalid, the search of Coolidge's automobile was in effect a warrantless search. Mr. Justice Stewart, writing for the plurality, rejected the argument that *Carroll* would justify the search since the Coolidge car was immobile at the time of the search and seizure.

> The word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears. And surely there is nothing in this case to invoke the meaning and purpose of the rule of *Carroll* * * * – no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, * * * no confederates waiting to move its evidence, not even the inconvenience of a special

> police detail to guard the immobilized automobile. In short, by no possible stretch of the legal imagination can this be made into a case where "it is not practicable to secure a warrant," * * * and the "automobile exception" despite its label, is simply irrelevant. 403 U.S. at 461-462.

As in *Coolidge*, the petitioner here was placed in custody prior to the time that the searching officers entered his locked hangar to seize and search his unoccupied, parked aircraft. Significantly, this hangar was surrounded by seven armed law enforcement agents, and these agents had obtained from petitioner the keys to the aircraft, the hangar, and the automobile parked nearby. There was no way petitioner could have gained access to the aircraft. Furthermore, the agents had no objective reason to believe that other suspects were involved. The Fifth Circuit's opinion goes to great lengths to favorably compare the inherent mobility of an aircraft to that of an automobile, but the Court failed to recognize that at the time of the search and seizure, the exigency had terminated. Thus, in the terms of the *Carroll* Court, aircraft N569MA, at the time of the initial search and seizure, more resembled a house or a building rather than a mobile vehicle. 267 U.S. at 153.

The Fifth Circuit's reliance on *Chambers* and *White* is misplaced.

> * * * The rationale of *Chambers* is that *given* a justified initial intrusion, there is little difference between a search on the open highway and a later search at the station. Here, we deal with the prior question of *whether* the initial intrusion is justified. For this purpose, it seems abundantly

> clear that there is a significant constitutional difference between stopping, seizing, and searching a car on the open highway, and entering private property to seize and search an unoccupied, parked vehicle * * *. *Coolidge v. New Hampshire*, 403 U.S. at 463 n. 20 (emphasis in original).

See also, Cardwell v. Lewis, 417 U.S. 583, 593, 94 S. Ct. 2464, 41 L.Ed. 2d 325 (1974). Here, there is no justification for the initial warrantless seizure and search.

The holding of the Fifth Circuit that a non-mobile vehicle may be searched any time after probable cause is generated also conflicts with recent post-*Chambers-Coolidge* decisions. *United States v. Chadwick*, 532 F.2d 773 (1 Cir. 1976), *cert. granted*, October 4, 1976, No. 75-1721; *United States v. McCormick*, 502 F.2d 281 (9 Cir. 1974); *United States v. Bradshaw*, 490 F.2d 1907 (4 Cir. 1974), *cert. denied*, 419 U.S. 895 (1974); *cf. United States v. Robinson*, 533 F.2d 578 (D.C. Cir. 1976), *cert. denied*, ___ U.S. ___, 96 S. Ct. 1432 (1976). Similarly, articles on this question in various law review publications strongly support the argument that the *Carroll* doctrine only applies when the vehicle is mobile at the time of the initial search or seizure. *See, e.g.*, Note, *Warrantless Searches and Seizures of Automobiles*, 87 Harv. L. Rev. 835, 842 (1974); Note, *Mobility Reconsidered: Extending the Carroll Doctrine to Movable Items*, 58 Iowa L. Rev. 1134, 1137 (1973); Note, *Warrantless Searches and Seizures of Automobiles in the Supreme Court from Carroll to Cardwell: Inconsistency Through the Seamless Web*, 53 N.C. L. Rev. 722, 727-28 (1975).

Thus, the Fifth Circuit's opinion goes beyond the parameters of the so-called automobile exception to the warrant requirement of the Fourth Amendment. Its rationale means

that once exigent circumstances exist they do not dissolve even if the basis for the exigency no longer exists. This holding would make the automobile "exception" the rule and turn the word "automobile" or "aircraft" into a talisman "* * * in whose presence the Fourth Amendment fades away and disappears." *Coolidge v. New Hampshire*, 403 U.S. at 461-62. Consequently, this Court should grant certiorari in order to announce that the test to be applied in creating exigency premised on mobility is whether the vehicle is mobile at the time of the initial search or seizure and not whether the vehicle was mobile sometime earlier when probable cause was generated.

CONCLUSION

The questions presented above go to the heart of the Fourth Amendment's protection against unreasonable and warrantless searches and seizures. These questions must be answered if the protections afforded by that Amendment to all citizens, whether innocent or guilty, are to have continuing viability. Therefore, it is respectfully submitted that this petition for writ of certiorari be granted and the judgment of the Fifth Circuit be reviewed.

Respectfully submitted,

/s/ JAMES M. RUSS
I. PAUL MANDELKERN

Law Offices of James M. Russ
441 First Federal Building
109 East Church Street
Orlando, Florida 32801
Telephone: (305) 849-6050

Attorneys for Petitioner

APPENDIX A

CORRECTED

UNITED STATES of America,
Plaintiff-Appellee,

v.

John J. BRENNAN,
Defendant-Appellant.

No. 75-3939.

United States Court of Appeals,
Fifth Circuit.

Sept. 13, 1976.

Defendant was convicted before the United States District Court for the Middle District of Florida, George C. Young, Chief Judge, and he appealed challenging validity of warrantless search of his airplane that disclosed marijuana on which convictions were based. The Court of Appeals, Clark, Circuit Judge, held that search at airport which was not functional equivalent of border did not possess characteristics of border search or other regular inspection procedures; that customs officials involved did not possess, because of their status, authority to search plane for contraband at airport without probable cause or warrant; but that both probable cause and exigent circumstances were presented to law enforcement officers at airport justifying search of plane under traditional Fourth Amendment standards.

Affirmed.

1. Customs Duties ⇐126

No warrant or showing of probable cause is required to support searches for contraband at functional equivalent of border.

2. Searches and Seizures ⇐3.3(2)

Where, inter alia, international flights made up only small percentage of traffic at airport and there was no attempt by airport officials to screen and separate international flights at takeoff and landing, and facts did not furnish any reliable indication that flight by defendant, who filed no flight plan and whose only known direction of travel led toward metropolitan center in South Florida, was international, search of defendant's airplane at airport, which was not functional equivalent of border, did not possess characteristics of border search or other regular inspection procedures but more resembled common nonborder search based on individualized suspicion which must be prefaced by usual warrant and probable cause standards.

3. Customs Duties ⇐126

Neither agents of border patrol nor customs service may conduct search on less than probable cause at point other than border or its functional equivalent, and thus customs officials involved did not, because of their status, possess authority to search defendant's airplane for contraband at airport which was not functional equivalent of border without probable cause or warrant. 19 U.S.C.A. § 482; Immigration and Nationality Act, § 289, 8 U.S.C.A. § 1357.

4. Searches and Seizures ⇐3.3(1)

Warrantless searches require same investigative basis in fact or reasonable conjecture as searches under warrant, which information may be supplied in whole or in part by informant.

5. Searches and Seizures ⇐3.3(2)

Where insufficient information about tip and tipster is available to justify reliance upon tip alone, investigating officers may supplement tip by surveillance of subject or corroboration of key elements of tip from relatively objective sources so as to provide probable cause for search.

6. Searches and Seizures ⇐3.3(1)

Basis of informant's knowledge and information justifying belief in informant as a person or in intrinsic reliability of his tip must be present in order to justify search on basis of tip alone.

7. Searches and Seizures ⇐7(20)

Where law enforcement officials detected aircraft proceeding down taxiway in dark with its lights off at time almost exactly that predicted by informant, whose statement that defendant was going to smuggle 1,600 or 1,700 pounds of marijuana into United States was insufficient in itself as basis for search and seizure, in his estimate of time required for smuggling trip, equivocal information ripened into probable cause on the scene and thus, since exigent circumstances existed for search of airplane because of its mobility and because of reasonable inference that confederates might be present with attendant danger of destruction or dispersion of evidence if warrant procedure was followed, warrantless search of airplane was justified under traditional Fourth Amendment standards. U.S.C.A.Const. Amend. 4.

8. Searches and Seizures ⇐7(10)

Allowing chances of escape or armed confrontation with law enforcement officials to decrease by permitting airplane to proceed to hangar even though, because of its mobility, airplane could have been stopped and searched any time after probable cause for search was generated when airplane was identified on taxiway, did not violate defendant's Fourth Amendment rights. U.S.C.A. Const. Amend. 4.

Appeal from the United States District Court for the Middle District of Florida.

Before TUTTLE, AINSWORTH and CLARK, Circuit Judges.

CLARK, Circuit Judge:

A warrantless search of defendant's airplane disclosed the marijuana on which his convictions were based. Its validity is the only issue on appeal. Our rejection of the district court's rationale that the airport at which the search occurred was the functional equivalent of the border requires that we examine the authority of the searching Customs agent. Having concluded that, after *United States v. Almeida-Sanchez*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973), Customs agents possess no authority to search on less than probable cause at points removed from the border or its functional equivalent, we have reviewed the facts and circumstances which led to the search to determine whether probable cause and exigent circumstances existed to justify the officers' actions. This final analysis reveals that the search was good, and the convictions are affirmed.

I.

On April 22, 1976, Drug Enforcement Administration (DEA) agent Dennis Fitzgerald received a telephone call from Douglas Dufresne, a Pan American World Airways pilot. Dufresne told Fitzgerald that he had information leading him to suspect that John J. Brennan "was going to engage in some smuggling activities into the Melbourne Regional Airport." Prior to the call, Fitzgerald had had no dealings with Dufresne and had never heard of Brennan.

On April 25, Fitzgerald and another DEA agent met with Dufresne at his residence. At this meeting, Dufresne described Brennan's plane as a 1969 twin

engine Beagle, blue and gold in color, with tail number N569MA, and told the agents that the aircraft was kept in a hangar at the Melbourne Regional Airport. He also recounted a trip to Colombia he had made with Brennan in November 1974, during which the two of them had been arrested by Colombian police and kept in jail for about a month. After investigation and court proceedings, all charges were dropped, and Brennan and Dufresne were allowed to leave Colombia. Dufresne never disclosed the basis, if any, for the arrest and detention. Finally, Dufresne told the agents he suspected that Brennan would install a 55-gallon auxiliary fuel tank in the Beagle to enable him to make a flight to Colombia and back without refueling and that the purpose of the trip would be to smuggle in 1600 or 1700 pounds of marijuana. Dufresne's load estimate was based on his own guess as to the plane's capacity and not on anything Brennan had told him.

On April 28, 1975, Dufresne called Fitzgerald and reported that he had recently talked to Brennan by phone and inferred from the conversation that the smuggling trip would take place within the next two or three weeks. Dufresne stated to Fitzgerald that this inference was based on Brennan's purchase of the plane and insurance for it in the amount of $95,000 at a time when he, Dufresne, had personal knowledge that Brennan was experiencing great difficulty in meeting the day-to-day living expenses of his family. When Dufresne asked Brennan about his expensive purchase, the latter had replied, "I am just doing my thing." Brennan had also requested that Dufresne try to locate a second-hand loran—an overwater navigational device suitable for ship or aircraft use. Brennan had said the loran was for "his brother's boat."

Fitzgerald confirmed that aircraft N569MA was hangared at the Melbourne Regional Airport. When he contacted the American Embassy in Colombia to investigate the November 1974 arrest of Brennan and Dufresne, he learned that three suspected smugglers, Richard H. Silkie, James King, and Richard Ferrara, had been jailed at the same time, but further investigation failed to establish any relationship between Brennan, Dufresne and the three or what charges had been made against Brennan and Dufresne. The El Paso Intelligence Center was notified to put the tail number of the aircraft into its computer which was used to collect and report possible smuggling-related flight activity.

On May 17, 1975, at approximately 11:00 a. m., Fitzgerald received word that the Beagle aircraft had taken off from Melbourne and was headed in a southwesterly direction. Alleged radar contact with the plane was lost when it entered the air traffic pattern over Miami.[1] Fitzgerald contacted Customs officers headquartered at Tampa, advised them of the Dufresne tips and the flight of N569MA, and requested assistance.

1. At the suppression hearing, Brennan and the Government clashed sharply over the source of the information that the aircraft was actually in flight. Brennan claimed that there was no confirmation that Fitzgerald's order to Agent Wingfield to have the plane's tail number put into the El Paso computer had been carried out and that even if it had been, the information Fitzgerald received May 17, involved multiple hearsay problems. Despite considerable wrangling over these questions at the suppression hearing, on appeal both sides appear to treat them as questions of the degree of reliability of the information Fitzgerald and his team possessed at that time. The trial court made no explicit factfindings on either the loading of the computer or the tracking of N569MA, if any, on the morning of May 17.

An estimated 6 to 7 hours later, two Customs agents, Hays and Miller, were dispatched to the Melbourne airport; they arrived at 5:00 p. m. At approximately 1:30 a. m. on the morning of May 18, the Customs agents sighted a Beagle aircraft moving along the taxiway leading to the hangar normally occupied by the Brennan plane and identified it as N569MA. The plane taxied to the door of the hangar, at which time the agents drove their van to another location near the hangar. During this time, a white male later identified as Brennan exited the hangar and headed toward his nearby automobile. Upon encountering a Melbourne police officer, Brennan headed back toward the hangar, where he was detained by DEA agents. Agent Hays entered the hangar through its partially open door and approached the plane. Observing through the window of the airplane a number of tightly wrapped packages characteristically used to transport marijuana, he decided to conduct a full search of the plane, which disclosed 60 packages of marijuana totaling approximately 1600 pounds and one bundle containing 466 grams of hashish. Following this discovery, Brennan was arrested.

After a hearing at which this testimony was developed, the district court denied the motion to suppress, ruling that the Melbourne airport is the functional equivalent of the border "with regards to those aircraft actually arriving from outside the United States." The district court characterized the test to be applied to the facts in making the determination of functional equivalency was "whether there was reasonable cause to believe that defendant's plane did in fact arrive from outside the United States." Finally, in applying that test, the court found that "[c]onsidering all factors involved, including the information given the government agents by the confidential informant who had been in close contact with the defendant," reasonable cause existed for such a belief.

II.

[1] This court must first determine whether the district court was correct in deciding that the search took place at the functional equivalent of the border. If so, the agents were entitled to conduct a full search for contraband without particularized knowledge of what Brennan or his plane was carrying. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272–273, 93 S.Ct. 2535, 2539, 37 L.Ed.2d 596 (1973); *Carroll v. United States*, 267 U.S. 132, 154, 45 S.Ct. 280, 285, 69 L.Ed. 543 (1925). No warrant or showing of probable cause is required to support such searches. The national interests in self-protection and protection of tariff revenues authorize a requirement that persons crossing the border identify themselves and their belongings as entitled to enter and be subject to search.

In writing for the court, Justice Stewart did not define the "functional equivalent" phrase; instead he gave illustrative examples:

> For example, searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search.

United States v. Almeida-Sanchez, supra, 413 U.S. at 272–73, 93 S.Ct. at 2539. In

the first example there inheres a high degree of probability that a border crossing took place and an attendant likelihood that nothing about the object of the search has changed since the crossing. The location of the checkpoint according to the criteria customarily employed by ranking Border Patrol officials minimizes the uncertainty, and statistical study of those passing through the checkpoint gives both the officers on the scene and the reviewing courts a benchmark against which to measure it.[2] In the case of the airport search of the nonstop flight, both assumptions become certainties. Thus, as Justice Stewart pointed out, the search of the nonstop flight "would clearly be" a search at the functional equivalent of the border, whereas a search at a checkpoint "might be"—if the facts and circumstances with respect to the location provided the necessary degree of certainty that persons and objects passing through that location were entering the country unchecked. At *Almeida's* "functional equivalent," there neither is nor need be any evidence pointing to specific persons as "suspects" before they pass through the location.

[2] The Melbourne Regional Airport was not the functional equivalent of the border when Brennan's plane landed and taxied into its hangar. Two factors lead us to this conclusion. First, international flights make up only a small percentage of the traffic at the airport, and there was no attempt by airport officials to screen and separate international flights at takeoff and landing.[3] While it is true that a nonstop flight arriving from outside the country "brings the border with it," the facts here do not furnish any reliable indication that Brennan's flight was international. He filed no flight plan and his only known direction of travel led toward a metropolitan center in south Florida. The assumed international origin, which was crucial in Justice Stewart's nonstop flight example, is simply too attenuated here to support this search as one occurring at a functional equivalent of an international border. Second, the regularity factor emphasized in *United States v. Martinez-Fuerte*, — U.S. ——, 96 S.Ct. 3074, 48 L.Ed.2d —— (decided July 6, 1976, 44 U.S.L.W. 5336), is absent here. At a ground traffic checkpoint, at the end of a ship's gangplank, or at an established Customs station, each encounter between private citizen and public official begins in substantially the same way. The intrusion is minimal, the existence and function of the checkpoint is known to the citizen in advance of his entry into its lanes, there is little discretionary enforcement activity, and the results of the checking procedure may be reviewed by the courts without distortion of the issue of reasonableness by hindsight knowledge that the search produced the desired fruits, if any, of the stop or search. *See United States v. Martinez-Fuerte, supra*, —— U.S. at ——, 96 S.Ct. at 3082, 44 U.S.L.W. at 5340–42. By contrast, the operation here involved a full search, was not anticipa-

2. *See United States v. Martinez-Fuerte*, —— U.S. ——, ——, 96 S.Ct. 3074, 3079, 48 L.Ed.2d ——, 44 U.S.L.W. 5336, 5338–39 (1976); *United States v. Baca*, 368 F.Supp. 398, 406–07 (S.D.Cal.1973).

3. Customs inspector Joseph Birnbaum testified at the suppression hearing that 23 international flights landed at Melbourne Regional Airport in May, 1975, and that the total number of international flights for a period from May 1, 1974 to May 3, 1975 was 303, or slightly less than one per day. However, the statistics are compiled from voluntary pilot reports and are not subject to any verification procedures.

ted by the subject, involved discretionary decisions at several levels of authority, and was so particularized to the suspicions of defendant's activities that the success of the search clearly cast an aura of reasonableness on the encounter itself. In sum, this search did not possess the characteristics of a border search or other regular inspection procedures. It more resembled the common nonborder search based on individualized suspicion, which must be prefaced by the usual warrant and probable cause standards, unless the authority of the searching officials is not controlled by *Almeida-Sanchez*.

III.

[3] Thus, the next question is whether the Customs officials involved, because of their status, possessed the authority to search Brennan's plane for contraband at the Melbourne airport without probable cause or a warrant.

This portion of our review must confront the question reserved in *United States v. Freund*, 525 F.2d 873 (5th Cir. 1976), *cert. denied*, —— U.S. ——, 96 S.Ct. 2631, 49 L.Ed.2d 377; *United States v. Soria*, 519 F.2d 1060 (5th Cir. 1975): to what extent is the law of *Customs* searches affected by the Supreme Court's decisions in *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973), and subsequent cases involving *Border Patrol* agents.[4] After examining the legislative and judicial history of "border search" authority (particularly the *Almeida-Sanchez* family of decisions) and the policy basis adopted by these authorities, we conclude that after *Almeida-Sanchez* neither agents of the Border Patrol nor of the Customs Service may conduct a search on less than probable cause at a point other than the border or its functional equivalent.

In *Soria* this court distinguished Customs searches from Border Patrol searches during the period prior to June 21, 1973, the effective date of *Almeida-Sanchez*. However, the panel acknowledged that the principal grounds for distinction were the nonretroactive effect assigned to *Almeida-Sanchez* coupled with the statutory and regulatory roles assigned to the Customs and Border Patrol agencies. Pre-*Almeida-Sanchez* searches by Border Patrol agents were governed by statutes, regulations and decisions granting immigration officials unfettered discretion to search any vehicle for aliens within the 100-mile radius of the border. *United States v. Soria*, *supra*, 519 F.2d at 1062. However, since Customs officials were bound to observe the "reasonable suspicion/border nexus" test even before *Almeida-Sanchez*, *see id.* at 1062–63, *Soria* simply does not affect today's analysis, which is directed toward determination of post-*Almeida-Sanchez* customs search law.

Customs searches have a longer history than Border Patrol activities. The First Circuit noted in construing the predecessor of the present Customs search statute,[5] that laws conferring the right to search persons and vessels at or

4. *Bowen v. United States*, 422 U.S. 916, 95 S.Ct. 2569, 45 L.Ed.2d 641 (1975); *United States v. Ortiz*, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975); *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *United States v. Peltier*, 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975).

5. Search of vehicles and persons

Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is sub-

near international boundaries have existed since the foundation of the government. *See Lee v. United States*, 14 F.2d 400, 404 (1st Cir. 1926), *rev'd*, 274 U.S. 559, 47 S.Ct. 246, 71 L.Ed. 1202 (1927); Act of July 31, 1789, ch. 5, 1 Stat. 43 (1789). Immigration searches are of considerably more recent vintage. There was no restriction of immigration at all until 1875, and the authority for Border Patrolmen to search was not codified until 1925.[6]

> ject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial.
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> 19 U.S.C. § 482 (1970). *See also* 19 U.S.C. §§ 1481–82 (1970).

6. Powers of immigration officers and employees—Powers without warrant

> (a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> (2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States.
>
> (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; and
>
> (4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, or expulsion of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States. Any such employee shall also have the power to execute any warrant or other process issued by any officer under any law regulating the admission, exclusion, or expulsion of aliens.
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> * * * * * *
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> Search without warrant
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> (c) Any officer or employee of the Service authorized and designated under regulations prescribed by the Attorney General, whether individually or as one of a class, shall have power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for exclusion from the United States under this chapter which would be disclosed by such search.
>
> 8 U.S.C. § 1357 (1970) *formerly* 8 U.S.C. § 110 (1946). The Immigration and Nationality Act of 1924, Act of May 26, 1924, 43 Stat. 153, was amended three times to provide gradually expanded arrest and search powers to immigra-

As the number of customs and immigration violations increased, single officers were empowered to investigate both types of crime. In 1959, this court first decided a case involving one of thes two-hatted agents, calling the search a "border search," and citing both immigration search and customs search cases. *See United States v. Ramirez*, 263 F.2d 385, 387 (5th Cir. 1959), *citing King v. United States*, 258 F.2d 754 (5th Cir. 1958), *cert. denied*, 359 U.S. 939, 79 S.Ct. 652, 3 L.Ed.2d 639 (1959) (customs); *Haerr v. United States*, 240 F.2d 533 (5th Cir. 1957); *Flores v. United States*, 234 F.2d 604 (5th Cir. 1956) (immigration). A year later, in *Barrera v. United States*, 276 F.2d 654 (5th Cir. 1960), a search by agents acting under authority of the customs laws alone was upheld on the authority of *Ramirez* and *King*; *Haerr* was cited in a footnote. Other circuits alternately distinguished Customs and Border Patrol searches and lumped them together as "border searches" governed by similar, if not identical, considerations.[7]

Almeida-Sanchez required probable cause for searches by roving patrols in the vicinity of the border. *See* 413 U.S. at 273, 93 S.Ct. at 2539–40, 37 L.Ed.2d at 602. In *United States v. Ortiz*, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975), the Court held that searches without warrant or probable cause at traffic checkpoints which were not functional equivalents of the border were constitutionally invalid. In a case decided on the same day, *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), the Court drew the line between authority to stop and right to search more distinctly:

> When an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion. As in [*Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 899 (1968)], the stop and inquiry must be "reasonably related in scope to the justification for their initiation." . . . The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.

422 U.S. at 881, 95 S.Ct. at 2580, 45 L.Ed.2d at 617. Up to this point, none of the *Almeida-Sanchez* family of cases

tion officers. *See* Act of February 27, 1925, ch. 364, tit. IV, 43 Stat. 1049 (establishing border and shore patrol, appropriating funds, and giving arrest and search power in border zone); Act of August 7, 1946, ch. 768, 60 Stat. 865 (adding power to arrest for crimes related to illegal immigration where officers have "reason to believe" such violations are occurring); Act of March 20, 1952, ch. 108, § 2, 66 Stat. 26 (adding power to search private lands, but not dwellings, within 25 miles of border). Old § 110 was repealed and replaced by § 1357 in 1952 without comment by the recommending committee. *See* 1952—1 U.S.Code Cong. & Admin. News p. 1653 (1952).

7. *Compare United States v. Saldana*, 453 F.2d 352, 354 (10th Cir. 1972) ("broad and unique powers given to customs and immigration officers at international borders and within immediate areas") (dicta); *Jones v. United States*, 326 F.2d 124, 131 (9th Cir. 1963), *cert. denied*, 377 U.S. 956, 84 S.Ct. 1635, 12 L.Ed.2d 499 (1964) (concurring opinion) *with Duprez v. United States*, 435 F.2d 1276 (9th Cir. 1970) (stop of pickup justified under 8 U.S.C. § 1357, but "no one . . . claiming this is a border search"); *United States v. Roa-Rodriquez*, 410 F.2d 1206 (10th Cir. 1969) (Border Patrol stop at Truth or Consequences, N.M., "not a border search").

departed from traditional Fourth Amendment jurisprudence developed in nonborder situations. Rather, they merely applied that jurisprudence in a new context. Searches, wherever conducted, required probable cause. The stopping of persons in vehicles for interrogations and investigations less intrusive than a search could be upheld as reasonable although the officer knew less than enough to give him probable cause to search or arrest.

Then, in *United States v. Martinez-Fuerte, supra*, the Court held that a brief investigatory stop could be conducted at a reasonably located checkpoint in the absence of any individualized suspicion. —— U.S. at ——, 96 S.Ct. at 3084, 44 U.S.L.W. at 5341. The basis for the official's breach of the citizen's privacy was found in the countervailing public interest expressed in a border control statute, 8 U.S.C. § 1357, which purported to do away with the warrant and probable cause requirements of the Fourth Amendment. But the Court made clear that its decision rested not on the statute but on another traditional Fourth Amendment exception—the regulatory inspection—by citing six cases or opinions acknowledging or suggesting the existence of such an exception.[8] It further limited its holding by noting that its balance of the interests of the citizen against those of the government dealt neither with searches nor with private dwellings, but to vehicles required only to stop briefly under largely predefined procedures.

The singular characteristic of the Border Patrol cases is that the Supreme Court has chosen in each instance to strike its own balance of Fourth Amendment "reasonableness," without regard to the express terms of 8 U.S.C. § 1357. The Court has not relied on the statute or its implementing regulation, despite its language empowering Border Patrol agents to make warrantless searches and arrests within a reasonable distance of the border and the definition of that distance as 100 air miles. At most, the Court has indicated that the statute identified a potential governmental interest to be balanced against individual rights and affirmed the government's intent to act to protect that interest.[9]

8. *Almeida-Sanchez v. United States*, 413 U.S. 266, 283–85, 93 S.Ct. 2535, 2544–45, 37 L.Ed.2d 596, 608 (1973) (Powell, J. concurring); *id.* at 288, 289–91, 93 S.Ct. at 2547–49, 37 L.Ed.2d at 611 (White, J. dissenting); *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972) (place-of-business inspection of firearms dealers pursuant to 18 U.S.C. § 923(g)); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970) (liquor license inspections); *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) (building code inspections under "area warrants"); *Carroll v. United States*, 267 U.S. 132, 154, 45 S.Ct. 280, 285, 69 L.Ed. 543, 551 (1925).

9. The circumstance of nonreliance is telling, because the language of the reasonable suspicion/border nexus test draws its quantum-of-knowledge standard from the language of the Customs search statute. On its face, the Customs search statute provides no spatial limitation on the search power. The "border nexus" portion of the test is a later judicial gloss designed to save the statute from patent unconstitutionality. *See, e. g., United States v. Rembert*, 284 F. 996, 1004 (S.D.Tex.1922). *Cf. General Motors Acceptance Corp. v. United States*, 62 F.2d 214 (5th Cir. 1932); *Thill v. United States*, 66 F.2d 432 (9th Cir. 1932); *United States v. One Hudson Coach*, 57 F.2d 539 (W.D.N.Y.1932). However, it antedates *Almeida-Sanchez*. In light of the new dichotomy between searches at the border and searches away from the border that case announces and the court's emphasis on an actual border crossing, *see* 413 U.S. at 271–72, 93 S.Ct. at 2589, 39 L.Ed.2d at 601, the gloss is no longer enough to save the reduced quantum-of-knowledge standard.

With this historical perspective, then, three factors persuade us that *Almeida-Sanchez* applies equally to Customs and Border Patrol searches. The first is the common origin of immigration search case law and customs search case law in the *Carroll* dicta relating to international boundaries. *See Carroll v. United States, supra*, 267 U.S. at 154, 45 S.Ct. at 285, 69 L.Ed. at 551. As identified there, the interest protected by both statutes is the same: protection of physical or fiscal interests of the United States against introduction of items harmful in themselves or because of their method of entry. In the Customs context, things like narcotics fall into the first category; others, such as tariff items concealed to avoid payment of duty, make up the latter. Border Patrol agents look for "contraband people," whether they immigrated legally or came in lawfully and overstayed or otherwise became deportable.

The second additional factor, which should be considered in conjunction with the first, is the accompanying governmental interest in judicial economy. In view of the substantial similarities between the government interests to be protected and the consequences to innocent members of the public if the probable cause barrier is lowered, we do not believe the Supreme Court would have created today's intricate analytical structure for Border Patrol cases only. Third, we note that other circuits have assumed, usually without explicit discussion, the applicability of *Almeida-Sanchez* concepts to searches by Customs officials.[10]

In sum, regardless of the officers' status, warrantless searches such as Brennan's must be made on probable cause.

IV.

Since the search did not take place at the functional equivalent of the border and the officers making the search are entitled to no special status under *Almeida-Sanchez*, we must inquire as to the existence of probable cause to search. We conclude that, through a combination of hearsay information from the tip, preflight corroboration of some of the details, and the on-the-scene corroboration of Brennan's surreptitious landing at the predicted time and place, such probable cause in fact did exist.

[4, 5] It is settled law that warrantless searches require the same investigative basis in fact or reasonable conjecture as searches under warrant. *See Carroll v. United States*, 267 U.S. 132, 156, 45 S.Ct. 280, 286, 69 L.Ed. 543, 552 (1925). Such information may be supplied in whole or in part by an informant. *United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 822 (1971); *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960); *Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959). Where insufficient information about the tip and the tipster is available to justify reliance upon it alone, investigating officers may supplement the tip by surveillance of the subject or corroboration of key elements of the tip from relatively objective sources.

10. *See, e. g., United States v. Solmes*, 527 F.2d 1370 (9th Cir. 1975); *United States v. Barbera*, 514 F.2d 294 (2d Cir. 1975); *United States v. Beck*, 483 F.2d 203 (3d Cir. 1973), *cert. denied*, 414 U.S. 1132, 94 S.Ct. 873, 38 L.Ed.2d 757 (1974).

Although there is no consensus on the type of information required to corroborate an informant's tip,[11] it is generally agreed that the better practice is to obtain corroboration of incriminating details. *See Spinelli v. United States, supra*, 393 U.S. at 414, 89 S.Ct. at 588, 21 L.Ed.2d at 642; Moylan, *Hearsay and Probable Cause*: An Aguilar *and* Spinelli *Primer*, 25 Mercer.L.Rev. 741 (1974). However, an accumulation of innocent detail conforming to the original tip has been held to have corroborative value. *See, e. g., United States v. Holliday*, 474 F.2d 320 (10th Cir. 1973).

[6] Neither Dufresne nor his tip met the *Aguilar* standards for informant credibility or informational reliability, even if the modified standards for first-time informants are employed. *See United States v. Bell*, 457 F.2d 1231 (5th Cir. 1973); *McCreary v. Sigler*, 406 F.2d 1264 (8th Cir.), *cert. denied*, 395 U.S. 984, 89 S.Ct. 2149, 23 L.Ed.2d 773 (1969). Dufresne stated clearly that his belief Brennan was going to engage in smuggling activity was his own extrapolation from a number of factual details. Objectively, the content of the Brennan-Dufresne telephone conversations is insufficient as a basis for search or seizure. Likewise, there is no sufficient basis in the record for crediting Dufresne's conclusions on the basis of Dufresne's reputation alone. Unlike the informant in a typical drug case, Dufresne had no "track record" of prior reliable tips; this case represented his first contact with law enforcement officials and the content of the tip revealed an intimate association with Brennan and his activities. *Aguilar* teaches that (1) the basis of the informant's knowledge and (2) the information justifying belief in the informant as a person or in the intrinsic reliability of his tip must be present in order to justify a search on the basis of the tip alone. *See* 378 U.S. at 114, 84 S.Ct. at 1514, 12 L.Ed.2d at 723. Even though the nature of Dufresne's employment and his direct contact and confidential relationship with Brennan affords a more reliable basis for assuming his trustworthiness and that of his information than would be present if Dufresne were repeating an underworld rumor or did not know aircraft capabilities, the information presented by and about Dufresne in this record falls short of this standard.

Similarly, the advance investigation conducted by DEA officials failed to corroborate enough of the significant details of Dufresne's story to comply with the *Spinelli* formula for curing deficient tips. The fact of Brennan's ownership of a Beagle aircraft, even with the addition of information as to a particular identifying number, is patently insufficient to justify a search; this is precisely the type of innocent detail held to be of insufficient corroborative value in *Spinelli* itself. *See* 393 U.S. at 414, 89 S.Ct. at 588, 21 L.Ed.2d at 642. Dufresne's story about his and Brennan's incarceration in Colombia could have been more valuable, but in view of the ultimate dismissal of the Colombian charge, we find it insufficiently probative of Brennan's future plans to smuggle drugs into the United States to hold that it supplied the informational link missing in the tip.

11. *Compare United States v. Larkin*, 510 F.2d 13, 15 (9th Cir. 1974) (corroboration of suspicious details required); *Thompson v. White*, 391 F.2d 724 (5th Cir. 1968), 406 F.2d 1176, 1178 (1969) (after remand) (corroboration of detail, innocent-appearing in absence of tip, sufficient) *with United States v. Canieso*, 470 F.2d 1224 (2d Cir. 1972) (corroboration of purely innocent detail sufficient).

Further, the agents' failure or inability to verify some of the more damaging details reported by Dufresne—the installation of auxiliary fuel tanks, Brennan's precarious financial condition or his indirect attempt to acquire a loran, for example—over a relatively lengthy period preceding Brennan's anticipated date of flight has, if anything, a slightly erosive effect on the believability of Dufresne's account.

[7] Of course, the inability to amass corroborating detail had two effects. One effect was to render it highly unlikely that a valid warrant could have been obtained in advance of May 18. A second and reciprocal effect was to require the additional investigation of Brennan's activities that led the DEA and Customs officials to be on the scene at the Melbourne airport on the morning of May 18. At the point at which the law enforcement officials detected the Beagle aircraft proceeding down the taxiway in the dark with its lights off, at a time almost exactly that predicted by Dufresne in his estimate for the time required for a smuggling flight, the quantum-of-knowledge ring closed around Brennan in the manner approved by the Supreme Court in *Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959). Through self-corroboration, equivocal information ripened into probable cause on the scene.

[8] In cases where searches are made without warrants, the Supreme Court has decreed that the existence of probable cause must be accompanied by circumstances rendering the warrant procedure impracticable. *Warden v. Hayden*, 388 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). We believe that those exigent circumstances were present here when Brennan landed at the airport in his Beagle aircraft. Because of its mobility the plane could have been stopped and searched any time after probable cause was generated, *i. e.*, as soon as it was identified on the taxiway. However, an attempt by the agents on the scene to have surrounded the plane on the taxiway might have resulted in alerting Brennan or in injury to the officers or others present at the airport. Accordingly, we do not believe that it was a violation of Brennan's Fourth Amendment rights to allow the chances of escape or armed confrontation with the officers to decrease by permitting him to proceed to his hangar. Further, in a very real sense, this case is analogous to *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *Texas v. White*, 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed.2d 209 (1975), and *Warden v. Hayden, supra*. Without holding that an airplane is the legal equivalent of an automobile for purposes of search and seizure, we note that the slightly greater difficulty of getting away from the scene in an airplane occasioned by the need to achieve takeoff speed is offset by the 360-degree range of airborne escape routes. As in *Warden v. Hayden*, and in contradistinction to *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 554 (1971), the officers followed Brennan into the place of search with relatively little elapsed time. *See also United States v. Santana*, —— U.S. ——, 96 S.Ct. 2406, 49 L.Ed.2d 300, 44 U.S.L.W. 4970 (1976). We note further that both the car and the panel truck outside the hangar were registered to Brennan. Since one person cannot drive two cars at once, and since it is unlikely that one person would conduct an entire smuggling operation involving

1600 pounds of marijuana alone, the record supports the reasonableness of an inference by the agents that confederates might be present, with an attendant danger of destruction or dispersion of the evidence if the warrant procedure had been followed. *See Guzman v. Estelle*, 493 F.2d 532, 536–38 (5th Cir. 1974); *United States v. Scott*, 520 F.2d 697 (9th Cir. 1975), *cert. denied*, 423 U.S. 1056, 96 S.Ct. 788, 46 L.Ed.2d 645 (1976); *United States v. Holland*, 511 F.2d 38 (6th Cir.), *cert. denied*, 421 U.S. 1001, 95 S.Ct. 2401, 44 L.Ed.2d 669 (1975); *United States v. Lewis*, 504 F.2d 92, 102 (6th Cir. 1974), *cert. denied*, 421 U.S. 975, 95 S.Ct. 1974, 44 L.Ed.2d 466. Accordingly, we hold that on the facts presented by this case, both probable cause and exigent circumstances were presented to the law enforcement officers at the Melbourne Regional Airport and that the search of Brennan's plane was justified under traditional Fourth Amendment standards. Therefore the motion to suppress was properly denied and the convictions are

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 75-3939

D. C. Docket No. 75-64-Orl-Cr-Y

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN J. BRENNAN,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

Before TUTTLE, AINSWORTH and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

September 13, 1976

Issued as Mandate:

APPENDIX C

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
TEL 504-589-6514
600 CAMP STREET
EDWARD W. WADSWORTH
NEW ORLEANS, LA. 70130
Clerk
OFFICE OF THE CLERK

October 20, 1976

TO ALL COUNSEL OF RECORD

No. 75-3939 – USA v. John J. Brennan

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Susan M. Gravors
Deputy Clerk

/smg

cc: Mr. James M. Russ
Mr. William F. Duane

RECEIVED
Oct. 22